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EXAMINER
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HOEY, ALISSA L

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MARY ANN HETTICH

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Appeal 2008-1419  
Application 10/780,510  
Technology Center 3700

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Decided: June 19, 2008

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Before LORA M. GREEN, RICHARD M. LEOVITZ, and  
FRANCISCO C. PRATS, *Administrative Patent Judges*.

LEOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1-7. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

## STATEMENT OF THE CASE

The claims are drawn to a therapeutic gradient stocking that may be worn on either leg. Claims 1-7, which are all the pending claims, are appealed and stand finally rejected under 35 U.S.C. § 103(a) as obvious over Russell (U.S. Pat. No. 3,440,665, issued Apr. 29, 1969) in view of Fregeolle (U.S. Pat. No. 3,975,929, issued Aug. 24, 1976) (Ans. 3).

We select claim 1 as representative of the appealed subject matter.

Claim 1 reads as follows:

1. A therapeutic gradient compression stocking comprising a foot portion, a leg portion having a lower leg portion and an upper leg portion and a waist support spaced above said leg portion and a hip portion extending between said leg portion and said waist support portion, said hip portion having a cutout portion on each side of said hip portion sized to accommodate the lower waist of the wearer so that the stocking may be worn on either leg; and said waist portion constructed so as to accommodate a fastener surrounding the patient's waist, said stocking being capable of being worn on either leg of the patient.

## OBVIOUSNESS

Claims 1-7 stand rejected under 35 U.S.C. § 103(a) as obvious over Russell in view of Fregeolle.

## FINDINGS OF FACT (FF)

### *Scope and content of the prior art*

The Russell patent

1. Russell describes a hip-high hosiery having stockings 5 and 6 (Russell, col. 2, ll. 10-12; see Fig. 1) which are united at the waist by a hook fasteners (*id.* at col. 1, ll. 36-39; see Figs. 3-5).

2. Stocking 6 has a foot portion 15, a leg portion 16, a hip portion, 17, and a waist support 18 which is elastic and tubular in construction (Russell, at col. 2, ll. 12-14, 32-34; *see* Figs. 1 and 2).
3. The hip portion 17 has a slit 22 that provides an opening beneath the waist (Russell, at col. 2, ll. 29-31; *see* Figs. 1 and 2).
4. As shown in Fig. 2 of Russell, the slit 22 has a cutout portion in the front and back of the hip portion 17 of stocking 6. *See* Fig. 2, particularly the pair of lines drawn from numeral “22” pointing to the frontside and backside cutouts of stocking 6.
5. The slit 22 is worn around the lower waist (FF 3) of the wearer.
6. A stocking can be interchangeably worn on either leg by turning it inside out (Russell, at col. 2, ll. 65-68).

The Fregeolle patent

7. Fregeolle teaches a therapeutic gradient compression stocking (Fregeolle, at col. 1, ll. 4-9) to reduce the incidence of pulmonary embolism (*id.* at col. 1, ll. 10-17).

*Differences between the prior art and the claimed invention*

8. Russell describes a stocking having foot, leg, and hip portions (FF 2), and a waist portion accommodating a fastener (FF 1) – as required by claim 1.
9. Russell’s stocking also has cutout portions in the frontside and backside (FF 3, 4) which are worn around the wearer’s lower waist (FF 5) – meeting the limitation of claim of a “hip portion having a cutout portion on each side of said hip portion sized to accommodate the lower waist.”
10. The stockings described in Russell can be worn interchangeably on either leg (FF 6) as can the stocking of claim 1 (“the stocking may be worn either leg”).

11. Russell does not describe a “therapeutic gradient compression stocking” as recited in the preamble of claim 1, but Fregeolle teaches a gradient compression stocking type to reduce the incidence of pulmonary embolism (FF 7).

*Reason to combine the prior art*

12. Persons of ordinary skill in the art would have had reason “to have provided the stocking of Russell . . . with the therapeutic compression construction of the stocking of Fregeolle, since the stocking of Russell provided with the therapeutic compression construction would provide not only a stocking garment that secures at the waist to prevent the garment from falling down when worn but also provides therapeutic needs to the wearer preventing incidence of pulmonary embolism” (Ans. 4-5).

ANALYSIS

The examiner bears the initial burden of showing unpatentability. *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). In making an obviousness determination, a reason must be provided as to why persons of ordinary skill in the art would have combined the prior art to have arrived at the claimed invention. *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007).

After reviewing the scope and content of the prior art and the reason for combining it, it is our opinion that prima facie obviousness of the subject matter of claim 1 has been established. The only difference between the claimed invention and the prior art is that Russell does not describe a therapeutic gradient stocking as recited in the preamble of claim 1 (FF 11). However, a gradient compression stocking is described by Fregeolle (7) and the Examiner provides a logical reason to have provided Russell’s stocking

with gradient compression (FF 12). Thus, we turn to Appellant's rebuttal arguments and evidence.

Appellant states that the claimed invention is "a therapeutic gradient compression stocking having two cutout portions in each stocking leg" (Reply Br. 1). Appellant asserts that Russell describes "two stockings, one stocking having one slit specifically configured to be worn on the right leg, and the other having one slit specifically configured to be worn on the left leg" (App. Br. 3). Appellant contends that "[n]either of these stockings has two slits" (*id.*) as does the stocking of claim 1.

We are not persuaded by this argument that the Examiner erred. Claim 1 requires the stocking to have "a cutout portion on each side of said hip portion sized to accommodate the lower waist of the wearer so that the stocking may be worn on either leg." As shown in Fig. 2, stocking 6 has frontside and backside cutout portions (FF 4; Ans. 5) which form the slit 22; thus the stocking has "a cutout portion" on the sides of the hip portion as required by the claim. Appellant characterizes these two cutouts as a "one slit" (App. Br. 3), but both Figs. 1 and 2 of Russell show that the "slit" has a portion that faces the front and a portion that faces the back of the stocking – which are sides of the stocking and thus meet the language of claim 1.

Figs. 3 and 4 of the instant Specification show cutouts on the inner and outer lateral sides of the same stocking – in contrast to Russell who teaches cutouts on the stocking's front and back sides. However, claim 1 does not specify the location of the cutouts.

Appellant also contends that claim 1 requires the stocking to have two cutout portions in *each* stocking (App. Br. 3). We agree with the Examiner that the claim does not require the cutouts to be on the same stocking leg

(Ans. 5). “However, even if the claim provided limitations for a single stocking leg, Russell . . . still teaches two slits in a single stocking leg, one cutout in the front of the leg portion and the other cutout in the back of the leg portion” (*id.*).

During patent examination, we give the words in the claims their “broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). “Giving claims their broadest reasonable construction ‘serves the public interest by reducing the possibility that claims, finally allowed, will be given broader scope than is justified.’” *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (internal citations omitted). “An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. Only in this way can uncertainties of claim scope be removed, as much as possible, during the administrative process.” *In re Zletz*, 893 F.2d 319, 322 (Fed. Cir. 1989). In this case, except for not disclosing a therapeutic gradient compression stocking, we find that Russell describes a stocking that meets all the limitations of claim 1 as it would be properly interpreted by one of ordinary skill in the art.

Appellant also contends Russell “provides no motivation to wear the hosiery on one leg only,” asserting that “the very structure of the hosiery of Russell is such that even if one wanted to wear only one of the pair of stockings, it would be impossible” (App. Br. 4). The “use of one stocking alone would require the fastening member 40 [of Russell] to hook onto loop

33 of the same stocking” (App. Br. 4). This argument is not convincing. Claim 1 does not exclude the user from wearing another stocking. The claim recites that the “waist portion” is “constructed so as to accommodate a fastener surrounding the patient’s waist.” Russell has a fastener that extends around the waist (FF 1, 2), meeting the limitation of the claim. We do not find any language in the claim – and Appellant does not point to any – that expressly requires the fastener to completely extend around the waist without cooperating with a fastener from a second stocking member as shown in Fig. 1 of Russell.

Appellant argues that “Russell makes no mention of the hosiery being worn for other than aesthetic/fashion-related reasons” (App. Br. 5). This argument is not persuasive. There is no limitation in the claim that requires the claimed stocking to be worn for aesthetic or fashion reasons.

Appellant also contends that “if the stockings were constructed to provide therapeutic compression, turning one of the stockings inside out would cause the stocking to be uncomfortable to a wearer, for example as a result of seams that would irritate the wearer” (App. Br. 5). We agree with the Examiner that “[t]here is nothing that prevents the garment from being reversed and worn in the reversed manner” (Ans. 6) – even if this configuration were to be “uncomfortable to a wearer.” Once again, there is no limitation in the claim that would require the stocking to be comfortable and to lack irritation when worn.

According to Appellant, Fregeolle does not require “any slitting or cutout portions to fit the stocking to the leg of the wearer” and is designed to eliminate the need for slitting (App. Br. 6). “[S]lits or cutout portions are unnecessary and would in fact render the thigh-length stocking inoperable



by interrupting the supporting structure” (*id.*). Appellant also states that Fregeolle is only thigh-length and is not designed to extend up to the hip as is Russell’s hosiery (App. Br. 8-9).

These arguments are not persuasive. Fregeolle is relied upon for teaching a gradient compression stocking (FF 7; Ans. 8). From Fregeolle’s teachings, a person ordinary skill in the art would have understood how to produce a compression stocking from Russell’s design. As pointed out by the Examiner, Fregeolle’s teaching about “slits” refers to a non-compression part of the stocking (Ans. 7; Fregeolle, at col. 1, ll. 20-40), and thus is not teaching away from the claimed subject matter. Moreover, the Examiner is not proposing to modify Fregeolle’s thigh-length stocking; Fregeolle was relied on to the extent it teaches that gradient compression stockings were known in the prior art (Ans. 8). Similarly, we are not convinced by Appellant’s arguments about the lack of motivation to combine Russell with Fregeolle (App. Br. 9-10); such arguments describe modifications that are not suggested by the Examiner.

For the foregoing reasons, we affirm the rejection of claim 1 as obvious over Russell and Fregeolle. Claims 2-7 fall with claim 1 because separate reasons for their patentability were not provided. *See* 37 C.F.R. 41.37(c)(1)(vii).

#### TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Appeal 2008-1419  
Application 10/780,510

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